

Newsletter

by SRS LEGAL

● EUROPEAN UNION & COMPETITION



● SUSTAINABILITY AND COMPETITION

The Portuguese Competition Authority launches public consultation on a Best Practices Guide for the assessment of agreements between competitors that pursue sustainability objectives.



On May 29, 2024, the Portuguese Competition Authority (PCA) published a Best Practices Guide on Sustainability Agreements, which is currently under public consultation until 20 June (Best Practices Guide).

According to the United Nations (UN), sustainability is a concept that encompasses three fundamental dimensions: environmental, social and economic.

The growing awareness in our society of the extreme climatic phenomena and the strong pressure of human activity on ecosystems have gradually promoted the concept of sustainability to a civilisational, ethical and, more recently, legal imperative.

Competition law is a potential ally in the intersection between the more transversal objectives of economic development and the promotion of general consumer welfare, on the one hand, and the adoption of principles, rules and criteria linked to more efficient and sustainable business models, on the other.

Nevertheless, given the current rules of competition law and the standard of scrutiny in force, the growing integration of sustainability considerations into the most diverse economic policies in the European Union, including competition policies, has led to a lack of legal certainty for economic agents.

At European level, and to harmonise possible tensions between competition and sustainability, the European Commission, in its new Horizontal Guidelines, from June 2023, dedicates a new chapter to sustainability agreements, offering additional clarity on the application of competition law prohibitions in this field, highlighting the growing importance of the issue.

At a national level, and in line with what is already happening in several other European countries, the Best Practices Guide aims to provide support to companies that pursue sustainability objectives on national territory. To this end, the document outlines various criteria for assessing the legal and competitive compatibility of agreements that these companies may enter with their competitors (current or potential), while also providing useful information on the applicable safeguard and exemption regimes.

The PCA interprets the concept of sustainability broadly, referring to the United Nations Sustainable Development Goals, adopted by the OECD and identified in the European Commission's Guidelines on horizontal agreements.

The PCA puts forward the notion that collaboration can be important for boosting sustainability. However, it points out that collaboration should not be used as a means of concealing agreements that are anti-competitive, such as price fixing or market or customer sharing.

The Best Practices Guide systematises a self-assessment exercise by the companies themselves, decomposed into three stages:

- **Does the agreement restrict any competition rules?**

- **Can the agreement infringe competition law?**

- **Can the Agreement benefit from rules that safeguard it from the application of competition law?**

I. Does the Agreement restrict any competition parameters?

A sustainability agreement should not adversely affect the relevant parameter of competition, such as price, quantity, quality, choice, and innovation. Where the agreement does not refer to these issues at all, it will, in theory, escape the prohibition regime.

Among other examples of lawful agreements that do not fall under the prohibition regime, the Guide mentions agreements aimed at complying with requirements or certain binding prohibitions in international treaties, agreements or conventions (e.g. the use of certain pollutants), and agreements that are aimed at influencing internal business conduct, i.e. that do not concern the economic activity of companies (e.g. limiting the volume of internal documents to be printed). An agreement aimed at creating a database on the sustainability of value chains, production processes or raw materials (e.g. general information on suppliers that respect labour rights or pay decent wages)

will also be potentially lawful under competition rules, if it does not lead to a reduction of uncertainty about competitors' strategic behaviour in the market, amounting, for example, to an unlawful exchange of sensitive information. Finally, agreements for awareness-raising campaigns about environmental impacts or other negative externalities of consumer habits (e.g. to warn about animal welfare, unless it involves joint advertising) may also be lawful.

Even in cases where one or more competition standards are affected, the agreement can still be exempted or benefit from safeguards or be declared compatible with the competition law rules.

II. Can the Agreement infringe competition law?

When sustainability agreements negatively affect one or more parameters of competition, they will have to be assessed in general terms. According to the PCA, in these cases it is necessary to assess:

- a) Whether the agreement in question discloses a sufficient degree of harm to competition, i.e. whether it involves price fixing, market or customer sharing, limitation of production or innovation, or the exchange of strategic and sensitive information.

b) whether there are pro-competitive effects which could call into question, with reasonable doubt, that restriction of competition.

In the event of reasonable doubt as to the degree of harmfulness of a sustainability agreement, it is necessary to assess whether the agreement leads to significant negative effects. In particular, the following aspects should be considered:

- The parties' market power;
- If the agreement limits the autonomy of companies in their strategic decisions;
- Market coverage of the agreement;
- The level of exchange of commercially sensitive information in the context of the agreement;
- If the agreement leads to a considerable increase in prices or a significant reduction in production, variety, quality or innovation.

III. Can the Agreement benefit from any exemption that safeguards it from the application of competition law?

Sustainability agreements may benefit from some exemption or safeguard from the application of competition rules.

a) *De minimis* exemption

Companies can benefit from the exemption associated with *de minimis* agreements when, in line with the Commission's Horizontal Guidelines, the parties' aggregate market share does not exceed 10 per cent in any of the relevant markets affected by the agreement and they do not have the objective of preventing, restricting or distorting competition.

b) Block exemption

Research and development agreements (R&D Agreements) and specialisation agreements with a sustainability objective can benefit from the Block Exemption Regulations (BER) if they meet several cumulative conditions developed in the Commission's Horizontal Guidelines. Thus, regarding market share thresholds, in case of R&D agreements, jointly or against remuneration, with joint exploitation, the combined share must be equal to or less than 25%. In the case of specialisation agreements, if:

- The products of the specialisation are final products, the combined quota must be equal to or less than 20%;
- If the speciality products are intermediate products, the combined share should be 20% or less in the speciality product markets. On downstream product markets, it should also be 20% or less.

In addition to the market share thresholds, there are two other cumulative conditions:

- Sustainability agreements must not involve hardcore competition restrictions;
- They must not eliminate competition once they have been applied.

c) Non-binding safeguard of the sustainability standard

The Guidelines also establish a specific safeguard for agreements between competitors seeking to set a sustainable standard (for example, the development of a common labelling or logo for products that meet certain requirements related to a sustainability parameter), which are exempt provided they meet the following cumulative conditions:

- Transparent standard-setting process;
- The parties' freedom to apply more demanding rules than binding ones;
- Effective and non-discriminatory access to the results of the standard-setting process, ensuring that non-members can adopt the standard later

In addition, they must fulfil at least one of the following conditions:

- The standard must not lead to a significant increase in prices or a reduction in the quality of the products in question;
- The parties' combined market share must not exceed 20 per cent in any relevant market affected by the standard.

d) Agricultural producer agreements

Agricultural producer agreements with a sustainability objective can benefit from an exclusion from competition law.

To this end, the agreement must fulfil the following cumulative conditions:

- Include at least one agricultural producer (e.g. individual or producer organisation);

- Include agricultural products listed in Annex I of the TFEU and be related to their production or trade;

- Contribute to at least one of the following sustainability objectives:

- i) Environmental protection;

- ii) Production of agricultural products with pesticide reduction and risk management, or reduction of the danger of antimicrobial resistance;

- iii) Animal health and welfare.

- Applying a higher sustainability standard than the one required by EU or national law;

- Be indispensable for achieving the sustainability objective (it must not be possible for the parties to achieve it individually);

- Not eliminate competition after it has been applied.

IV. When can an agreement that restricts competition still be compatible with competition rules?

A sustainability agreement that restricts competition can still benefit from the exception and be declared compatible with competition law if the parties demonstrate that the four cumulative conditions, set out by the Commission in its Horizontal Guidelines, are met:

- a) Proof of efficiency gains - Does the sustainability agreement contribute to the improvement of production or distribution of goods, or promote technical progress? These efficiency gains must be demonstrable, objective, concrete and verifiable, outweighing the damage to competition;

- b) Indispensability - The planned competition restriction must be indispensable to achieving the expected benefits. As such, the agreement must demonstrate that it is reasonably necessary for the alleged benefits to materialise, and that there are no other economically viable and less restrictive means of achieving them;

- c) Passing on the gains to consumers - Affected consumers should receive a fair share of the benefits, so that the overall effect is at least neutral;

d) Non elimination of competition - The agreement must not give the parties the possibility of eliminating competition regarding a substantial part of the products in question. The PCA tells us in its Best Practices Guide that even if the agreement restricting competition covers the entire sector, competition must continue in at least one competition parameter.

In this regard, the PCA provides some examples of agreements that restrict competition and are compatible with competition law.

Participation of public authorities in the conclusion of sustainability agreements

The PCA's Best Practices Guide mentions the participation of public authorities in the conclusion of sustainability agreements, in line with the treatment given by the European Commission in the Horizontal Guidelines.

Co-operation between companies and company associations with a sustainability objective, promoted by public authorities, does not exempt these agreements from the application of competition rules, unless the parties have been obliged to conclude the agreement. In that event, they will not be held liable.

If the public authorities participate or are merely aware of the existence of the agreement, or alternatively merely encourage or facilitate the conclusion of such an agreement, without depriving the undertakings and association of undertakings of their autonomy, the agreement will remain subject to the application of competition law.

Public procurement and sustainability

The PCA emphasises the growing role of sustainability in public procurement procedures, which increasingly consider ecological criteria in public purchases of products, services, and public works contracts. Recognising this, the PCA is launching a checklist for companies so that they can assess the legitimacy of integrating a consortium in a public procurement procedure.

The companies:

- a) Must assess their ability to compete alone for the contract before considering a consortium;
- b) Assess whether the parties are strictly necessary for the performance of the contract;
- c) Ensure that exchanges of information do not go beyond what is strictly necessary, and that these exchanges take place only after the consortium has been formed;

d) If the parties forming the consortium are actual or potential competitors, it must be ensured that the consortium results in efficiency gains for the contracting authority, offsetting the restrictions of competition;

e) Ensure that the collaboration of the parties within the consortium is limited to the scope of the contract for which they are associated;

f) Carry out a self-assessment of the consortium's compatibility with European and national competition law.

Conclusion

The Best Practice Guide, as proposed by the PCA, introduces an innovative feature by emphasising that sustainability imperatives must be considered when applying competition rules, particularly with respect to the prohibition regime on anti-competitive agreements. The application, in theory, of the different exception, safeguard and exemption mechanisms empowers companies with the responsibility to self-evaluate their cooperation instruments and thus contribute to a better articulation between competition and sustainability objectives. In this respect, it is essential to ensure that potential projects in this field benefit from adequate legal advice also from an integrated competition perspective.

Meet the team:

